United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
LILLIAN Z. COHEN

75-2142

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[U.S. ex rel.] MARK FRASIER, :

Appellant, :

-against- :

J. L. CASSCLES, Superintendent of Great Meadow Correctional Facility, :

Appellee. :

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BRIEF FOR APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[U.S. ex rel.] MARK FRASIER, Appellant,	:	
-against-	:	Docket No. 75-2142
J. L. CASSCLES, Superintendent of Great Meadow Correctional Facility, Appellee.	:	

BRIEF FOR APPELLEE

Questions Presented

1. Did the District Court correctly hold that appellant's constitutional right to due process was not violated merely because the trial court took into account both the nature of the crime charged and the circumstances under which it was committed in denying appellant youthful offender treatment?

2. Did the District Court correctly hold that appellant did not have a due process right to a hearing or statement of reasons in connection with his application for youthful offender treatment?

Statement

This is an appeal from an order of the United States District Court (Brieant, J.), dated September 29, 1975, which denied appellant's application for a writ of habeas corpus without holding a hearing. On October 28, 1975, Judge Brieant granted appellant's application for a certificate of probable cause.

Facts

Appellant is presently confined in Great Meadow Correctional Facility, Comstock, New York, pursuant to a judgment of conviction rendered in Supreme Court, New York County. He was convicted after a jury trial of the crimes of Robbery in the First Degree, Assault in the Second Degree and possession of a Loaded Firearm and sentenced on May 21, 1968 as a Second Felony Offender to concurrent terms of 15 to 16 years on the robbery counts, 2 1/2 to 10 years on the assault count and 3 1/2 to 10 years on the firearms count.

At issue in the instant proceeding is the underlying felony conviction which was obtained in County Court, Bronx County (Korn, J.), upon appellant's plea of guilty of the crime of Grand Larceny in the Second Degree in satisfaction of an indictment charging him, inter alia, with Robbery in the First Degree.* He was sentenced on November 29,

* A copy of the indictment is set forth in the Appendix to this brief.

1961, to Elmira Reception Center. On April 25, 1973, he was sentenced in Supreme Court, Bronx County (Loquen, J.), nunc pro tunc, as of November 29, 1961, to the same term. The new judgment was entered pursuant to People v. Montgomery, 24 N Y 2d 130 (1969) for purposes of reinstating his time to appeal the 1961 conviction.

The points raised on appeal related to the trial court's denial of his 1961 application for treatment as a youthful offender. The judgment was affirmed without opinion by the Appellate Division, First Department. People v. Frasier, 43 A D 2d 908 (1st Dept. 1974). The New York Court of Appeals affirmed without opinion on February 12, 1975. People v. Frasier, 36 N Y 2d 655 (1975).

The Motion for Youthful Offender Treatment

Before entering his guilty plea in 1961, appellant moved for youthful offender treatment pursuant to Section 913-g of the former New York Code of Criminal Procedure. The affidavit prepared by his attorney stated that appellant was 18 years old and resided with his family in Manhattan; that he had reached the twelfth grade in school; that he had quit school to obtain a full-time job; that after approximately three months he was "laid off" and thereafter was unemployed. Defense counsel further stated that appellant had never been convicted of a crime and had never before "been in any trouble"; that he personally had known appellant for five years and had found him to be a "hard worker" and "dependable".

The District Attorney submitted an affidavit in opposition to appellant's motion. The affidavit stated that appellant had been indicted by the Grand Jury and charged with Robbery in the First Degree, Grand Larceny in the First Degree, Assault in the Second Degree and Receiving and Concealing Stolen Property. The indictment was based upon the fact that at about 2:45 a.m. on August 19, 1961, appellant, acting with another, had forcibly taken $38.00 from their victim. They were pursued and apprehended by the police. Upon arrest appellant had the sum of $24.00 in his possession, while his partner had the sum of $15.45. Appellant admitted to the police that during the robbery he had simulated possession of a gun by putting his hand in the pocket of his jacket. "In view of the nature of these charges, and the circumstances surrounding them," the District Attorney asked that appellant's motion be denied.

An order denying the motion was entered on October 5, 1961 (Korn, J.). Thereafter, on October 26, 1961, appellant entered his guilty plea to a reduced charge in satisfaction of the indictment.

Proceedings in the District Court

After taking an unsuccessful appeal from the judgment of conviction, appellant filed an application for federal habeas corpus relief claiming that (1) denial of his motion for youthful offender

treatment because he was charged with robbery "was contrary to the purpose of the [Youthful Offender] statute and therefore an unconstitutional denial of due process of law" (Petitioner's Memo., p. 2); (2) it was an abuse of discretion and "thus an unconstitutional denial of due process of law" to deny his motion "solely on the ground of the crime charged" (Petitioner's Memo., p. 5); and (3) "[d]enial of consideration for Youthful Offender Treatment without investigation or finding of fact" violated his right to due process and equal protection of the law (Petitioner's Memo., pp. 8, 14).

On September 29, 1975 the District Court denied the application, holding that appellant had failed to show a violation of any constitutionally protected right. With respect to the grounds relied upon for denying youthful offender treatment the Court stated:

> "While the statute then in effect categorically excluded only those youthful defendants accused of capital offenses of crimes which carried the punishment of life imprisonment, a judge could properly consider the offense charged and the alleged circumstances of its commission in exercising his discretion." (Appendix to App. Br., pp. 8-9).

The Court noted in this regard that the record did not show that the trial judge had "a predisposition against all youthful offender applications by defendants initially indicted for robbery - first degree."

The Court further found no constitutional error in the failure of the trial court "to make a more formal record of consideration and denial of youthful offender treatment" (Appendix to App. Br., p. 9), drawing an analogy to the procedure under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005, et seq. The question of whether the trial judge had adequately complied with the New York statute was held to be a question of state law and not subject to federal habeas corpus review.

Statute Involved

The Statute in effect at the time of appellant's 1961 conviction was the New York Code of Criminal Procedure. It provided in relevant part:

> § 913-e. Definitions
>
> For the purpose of this title, the term "youth" shall mean a minor who has reached the age of sixteen years or over but has not reached the age of nineteen; and the term "youthful offender" shall mean a youth who has committed a crime not punishable by death or life imprisonment, who has not previously been convicted of a felony, and who is adjudicated a youthful offender pursuant to the provisions of the following sections.***
>
> § 913-g. Determination of eligibility
>
> 1. In any case where a grand jury has found an indictment and it

shall appear that the defendant is a youth, the grand jury or the district attorney may recommend to the court to which the indictment was returned, or to which the indictment was transferred for disposition, or, the court on its own motion may determine, that the defendant be investigated for the purpose of determining whether he is eligible to be adjudged a youthful offender.

3. If the court approves the recommendation of the grand jury or the district attorney, or, if the court on its own motion determines that the defendant should be investigated hereunder and the defendant consents to physical and mental examinations, if deemed necessary, and to investigation and questioning, and to a trial without a jury, should a trial be had, the indictment or information shall be held in abeyance and no further action shall be taken in connection with such indictment or information until such examinations, investigation and questioning are had of the defendant.

4. Upon the termination of such examinations, investigation and questioning, the court shall determine whether such defendant is eligible to be adjudged a youthful offender. Should the court determine that the defendant is eligible to be so adjudged, no further action shall be taken on the indictment or information and the defendant shall be required to enter a plea of "guilty" or "not guilty" to the charge of being a youthful offender. Should the court determine the defendant ineligible to be so adjudged, it shall order the indictment or information to be unsealed and the defendant shall be prosecuted as though the proceeding hereunder had not been had.

Although the statute did not so provide, the defendant

could initiate the foregoing procedure by making a motion for a pre-pleading investigation to determine whether youthful offender treatment was proper. People v. Judd, 611 Misc 2d 180 (Co. Ct., Franklin Co. 1969). The decision to grant or deny such a motion was discretionary with the trial court. People v. Fenner, 30 N Y 2d 509 (1972), affirming 36 A D 2d 825 (2d Dept. 1971).

POINT I

THE DENIAL OF APPELLANT'S MOTION FOR YOUTHFUL OFFENDER TREATMENT BASED UPON THE NATURE OF THE CHARGES AND THE CIRCUMSTANCES SURROUNDING THEM DID NOT VIOLATE HIS RIGHT TO DUE PROCESS OF LAW.

Appellant claims that denial of youthful offender treatment violated his constitutional rights because the trial court relied "solely upon the basis of the crime charged" (App. Br., p. 11).* In appellant's view, this was an "unconstitutional misinterpretation" of the relevant statute and an unconstitutional abuse of discretion, given the favorable affidavit submitted by his attorney. These contentions, which are simply opposite sides of the same coin, are

* Appellant alleges a violation of his rights to due process and equal protection. However, since the equal protection allegation was not raised in the District Court, let alone in the state courts (see Picard v. Connor, 404 U.S. 270 [1971]), it may not be presented here. In any event, the allegation is wholly conclusory. Appellant does not even describe vis a vis whom his rights were denied.

without merit, and the District Court correctly so held.

Appellant initially contends that under § 913-e of the former Code of Criminal Procedure the nature of the crime charged could not be the sole basis for the trial court's determination denying youthful offender treatment -- as he conclusorily assumes it was in his case. According to his interpretation, only those crimes specifically enumerated by the statute could be used as a basis for denying youthful offender treatment without investigation.

The argument is flawed in two respects. First, it simply raises a question of state law and therefore, is not cognizable by way of federal habeas corpus. Thus, it is for the State courts to determine whether the purpose of a State statute has been served or violated. In affirming appellant's conviction, both the Appellate Division and the Court of Appeals have rejected the contention that the trial court acted contrary to the youthful offender statute. Appellant may not now ask this Court to substitute its judgment for that which was properly arrived at by the State courts. Compare United States ex rel. Birch v. Fay, 190 F. Supp. 105 (S.D.N.Y. 1961).

Moreover, even a cursory reading of § 913-e reveals that it simply prohibited the trial court from exercising any discretion in cases involving the crimes specified. With respect to any other crimes, the court was left to make its own discretionary evaluation, subject, as in the instant case to review by the appellate courts.

The New York cases which construed this provision make it clear that the nature of the crime charged could properly be taken into account by the court in the exercise of this discretion. See People v. Fenner, 36 A D 2d 825 (2d Dept. 1971), affd. 30 N Y 2d 509 (1972) (upholding denial of youthful offender treatment where District Attorney objected on the ground that "'this is a robbery in the first degree'". (36 A D 2d at 826) (Shapiro, J., dissenting).

Appellant attempts to elevate his statutory ground to a constitutional level by citing two recent state lower court decisions which held unconstitutional § 720.10 of the New York Criminal Procedure Law insofar as it denies youthful offender status to youths who have been "indicted for a Class A felony."* He reasons that if it is unconstitutional to preclude youthful offender consideration to youths charged with crimes specified in a statute, then a fortiori it is unconstitutional to do so on the basis of crimes not specified in the statute.

The cited cases, however, express a point of view which has been rejected by other state courts considering the question. See People v. Estrada, 80 Misc 2d 608 (Sup. Ct., Kings Co. 1975); People v. Drayton, 47 A D 2d 952 (2d Dept. 1975). More important, their reasoning is inapposite to the record in the instant case.

* Appellant cites People v. Brian R., 78 Misc 2d 616 (Sup. Ct., N.Y. Co. 1974), affd. 47 A D 2d 599 (1st Dept. 1975) and People v. Ruben S., 81 Misc 2d 305 (Sup. Ct., Queens Co. 1975).

Section 720.10 of the Criminal Procedure Law divests the trial judge of discretion to consider a defendant for youthful offender treatment if he has been indicted for a Class A felony. The courts which invalidated this provision concluded that it violates the due process clause "because it gives conclusive weight to the untested allegations of the indictment." People v. Brian, R., 78 Misc 2d 616, 619 (Sup. Ct., N.Y. Co. 1974) (emphasis supplied). By contrast, in the instant case, contrary to appellant's allegation, the trial judge did not act "on the basis of [the] indictment" (App. Br., p. 15) (emphasis in original).* The record shows that the court had before it an affidavit setting forth the facts which appellant's attorney deemed relevant to the youthful offender application, as well as the affidavit of the District Attorney, stating the facts relevant to the charges in the indictment. The District Attorney's affidavit does not object to youthful offender treatment simply on the ground that the defendant is charged with the crime of robbery. Contrast People v. Fenner, 36 A D 2d 825 (2d Dept. 1971), affd. 30 N Y 2d 509 (1972). Nor does it merely restate the formal charges initially set forth in the indictment. See Appendix herein. Instead, the affidavit explains the way in which the crimes charged were committed and sets forth facts -- which appellant has

* At another point in his brief, appellant alleges that he was denied consideration "solely on the ground of the type of crime" involved. However, as the District Court correctly pointed out, there is nothing in the record to show that the trial judge had a pre-disposition against defendants charged with certain types of crimes. Indeed, his comment at the time of sentence indicates that this was clearly not the case.

never denied -- showing that appellant and his companion were apprehended as they fled from the scene of the crime and that he admitted putting his hand in his pocket at the time of the crime as a means of suggesting that he was carrying a gun. See also Minutes of Plea, pp. 5-6. Based on "the nature of [the] charges, and the circumstances surrounding them", the District Attorney recommended that appellant's application be denied. The trial judge, who had all of this information before him, acquiesced in this recommendation.*

Appellant's claim is equally deficient when viewed from the standpoint of whether or not the trial judge properly exercised his discretion. Abuse of discretion, like alleged statutory violation, is essentially a question of state law and not cognizable by way of habeas corpus.

A frequently cited example of the refusal to accord such review -- and one which is closely analogous to the instant case -- involves claims attacking the sentence imposed. See Williams v. United States, 399 U.S. 235, 243 (1970); United States ex rel.

* The state cases also held that § 720.10 violates the equal protection clause since it discriminates against youths charged with Class A felonies but convicted of lesser felonies. Appellant hypothetically refers to this possibility (App. Br., p. 19) but does not press the point, perhaps because his own conviction of a lesser crime was not based upon a jury verdict but upon his voluntary guilty plea entered in the face of virtually certain conviction of the crimes charged. See People v. Drayton, 47 A D 2d 952 (2d Dept. 1975). The equal protection aspect of the youthful offender procedure is, in any event, not properly before this Court. See p. 6, supra.

Marcial v. Fay, 267 F. 2d 507, 509-10 (2d Cir. 1959). See also Smith v. Follette, 445 F. 2d 955, 960-961 (2d Cir. 1971) (upholds § 208[4][b] of the New York Mental Hygiene Law which gives the sentencing judge discretion, "albeit without specific standards to guide him", to determine which felons are to receive Narcotic Addiction Control Commission care); Lisenba v. California, 314 U.S. 219, 228 (1941) (denial of continuance not reviewable under Fourteenth Amendment on ground that trial court abused discretion); United States ex rel. Brown v. LaVallee, 424 F. 2d 457, 458, n. 2 (2d Cir. 1970), cert. denied 401 U.S. 974 (this Court expressed "grave doubts" that "a discretionary ruling [refusing to allow the withdrawal of a guilty plea] can be questioned on collateral attack").

In any event, appellant advances an untenable theory to support his abuse of discretion argument. He claims, in essence, that, whatever the crime charged, as a constitutional matter, a trial court has no discretion to deny an investigation regarding youthful offender treatment where the defense submits a generally favorable affidavit. (App. Br., p. 17). Indeed, he states: "It is the individual juvenile who is to be considered for youthful offender treatment, not what he is alleged to have done" (App. Br., p. 19). The short answer to this suggestion is that the Legislature and the Courts of New York have concluded otherwise.

Other Legislatures and other courts have reached a similar conclusion as to the relevance of the nature of the crime charged in

various contexts. For example, prior to its amendment in 1974, 18 U.S.C. § 5031 excluded from its definition of juvenile delinquency juveniles charged with crimes punishable by death or life imprisonment. The constitutionality of this exclusion was upheld in United States v. Quinones, 353 F. Supp. 1325 (D.C. P.R. 1973), affd. 516 F. 2d 1309 (1st Cir. 1975). A similar provision in the District of Columbia Code (16 D.C. Code 2301[e][a]) was held to be constitutional by the Court of Appeals for the District of Columbia. United States v. Bland, 472 F. 2d 1329 (D.C. Cir. 1972), cert. denied 412 U.S. 909 (1973). And in Long v. Robinson, 316 F. Supp. 22 (D.Md. 1970), affd. 436 F. 2d 1116 (4th Cir. 1971), the District Court struck down a geographical age distinction in the jurisdiction of the Maryland Juvenile Court, but its order granting relief, consistently with the Maryland statute, distinguished between youths who were 16 to 18 years old and accused of capital crimes and youths in that age group who were not so charged. See also United States v. Craven, 478 F. 2d 1329 (6th Cir. 1973) (in which the Sixth Circuit upheld a federal statute making it a crime for anyone under indictment for a crime punishable by imprisonment for a term in excess of one year to receive a firearm or ammunition shipped in interstate commerce); United States v. Thoreson, 428 F. 2d 654 (9th Cir. 1970).

In sum, appellant, has failed to satisfy his burden as a habeas corpus applicant of showing that his conviction was fundamen-

tally unfair simply because the trial judge considered the nature of the crime as well as the circumstances of its commission in denying him an investigation for youthful offender treatment.

POINT II

THE PROCEDURES FOLLOWED IN APPELLANT'S CASE DID NOT VIOLATE THE DUE PROCESS CLAUSE.*

Appellant's second claim is that his right to due process was violated because the trial court conducted no "investigation" in his case, i.e., no "investigation" to determine if he was eligible for investigation as a youthful offender, and also, because it stated no reasons for its denial of his application. Appellee submits that neither of these procedures was constitutionally required.

In urging variously that he was entitled to an "investigation" or "a form of hearing" (App. Br., p. 26) appellant relies primarily upon the Supreme Court's decision in Kent v. United States, 383 U.S. 541 (1966). That case, however, is inapposite.

Kent involved a defendant who was entitled to have his case heard before the Juvenile Court of the District of Columbia. Despite the fact that he had a "statutory right to the 'exclusive jurisdiction' of the Juvenile Court" (383 U.S. at 557), the Judge of that Court

* Appellant also alleges that his right to equal protection was violated. However, he has not exhausted his remedies as to this claim since it was not raised in the state courts. Picard v. Connor, supra. Moreover, the allegation is wholly conclusory.

waived jurisdiction of the defendant so that, as a consequence, he was tried in the District Court. The Supreme Court held that before such a waiver could occur the defendant was entitled to a hearing.

The obvious difference between Kent and the instant case is that there the Court's decision deprived the defendant of a status which he already had. See also Menechino v. Oswald, 430 F. 2d 403 (2d Cir. 1970) in which this Court discussed and rejected a claim that due process requires counsel at parole release hearings:

> "Nor is this the case where the state, in an adversary proceeding, is seeking to deprive a person of liberty, property or a status presently enjoyed. See, e.g., Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir., 1961) (expulsion from tax-supported college); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare payments); In re Gault, 387 U.S. 1 (1967) (adjudication as juvenile delinquent and commitment); In re Buffalo, 390 U.S. 544 (1968) (disbarment)." (Emphasis added)

Furthermore, unlike Kent, in the instant case it is not

> "'implicit in [the statutory] scheme that non-criminal treatment is to be the rule -- and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases.'" Kent v. United States, 383 U.S. at 560-561.

Aside from the impracticality of requiring "a form of hearing at which the asserted grounds for denial of the benefit [of a youthful offender investigation] may be answered by the defendant" (App. Br.,

p. 26), appellant's argument ignores the fact that no such opportunity for rebuttal is required in analogous situations, e.g., determining what sentence shall be imposed. It is significiant in this regard that appellant himself is unable to cite any analogous situation requiring such an opportunity.*

Appellant's claim that he was entitled to a statement of reasons is similarly defective. Indeed, the Supreme Court recently rejected a claim that a statement of reasons is required when a federal district judge determines that a young defendant will not benefit from treatment under the Federal Youth Corrections Act and, accordingly, sentences him as an adult. Dorszynski v. United States, 418 U.S. 424 (1974). Although Dorszynski was not decided on constitutional grounds, the reasoning of the Court is relevant. There, as in the instant case, the imposition of such a requirement would interfere with the broad discretion vested in the Court by the relevant statute.

Appellant also suggests that the youthful offender statute did not contain a "standard" upon which to base denial of youthful offender treatment (App. Br., p. 26). The answer to this contention is that the factors which are generally relevant to such determinations have been set out by the State courts and the statute must be read in light of these decisions. See Matter of Tschornyi v. Tompkins County Court, 283 App. Div. 910 (3d Dept. 1954); People v. Judd, 61

* Matter of Montalvo v. Montalvo, 55 Misc 2d 699 (1968) cited at page 23 of appellant's brief, involves a Kent-type waiver and, therefore, is inapplicable.

Misc 2d 180 (Co. Ct., Franklin Co. 1969).

Since the general factors relevant to the determination under Section 913-g have already been set out by prior cases, any attempt to formalize this standard into rigid prerequisites for youthful offender treatment would reduce the trial court's role from a discretionary to a ministerial one. This result would benefit neither the defendant nor the administration of justice. See Smith v. Follette, 445 F. 2d 955 (2d Cir. 1971).

POINT III

THE RELIEF DEMANDED BY APPELLANT IS INAPPROPRIATE.

The relief demanded by appellant in the event he prevails on the merits is release from confinement (App. Br., p. 27). This relief is wholly unwarranted given the fact that he is serving a sentence imposed pursuant to a valid 1968 conviction. Assuming arguendo that this Court finds that the denial of youthful offender treatment in 1961 was constitutionally improper, appellant is entitled, at most, to be resentenced as a first felony offender in connection with his 1968 conviction.

CONCLUSION

THE DECISION OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
December 24, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
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of Counsel

APPENDIX

Form 1B-47-2M-524031(55) 114

COUNTY COURT

IN AND FOR THE COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK

against

MARK FRASIER,
SHERMAN COBB,

Defendants

THE GRAND JURY OF THE COUNTY OF BRONX, by this indictment accuse said defendants,

Mark Frasier and Sherman Cobb

of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The said defendants, acting in concert with each other,

in the County of Bronx, on the nineteenth day of August, 1961,

in the night time of said day, unlawfully did take certain personal property owned by one John Crowe,

to wit: lawful money of the United States of America

in the sum of and of the value of - - - - - - -$38.00

from the person and in the presence of the said John Crowe

against his will, by means of force and violence and fear of immediate injury to his person.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant s of the crime of GRAND LARCENY IN TH FIRST DEGREE, committed as follows:

The said defendant s , acting in concert with e ach other,

in the County of Bronx aforesaid, on the day and in the year aforesaid, in the night time of said day, the same personal property mentioned, described and set forth in the first count of this indictment, to which reference is hereby made, of the value mentioned and set forth therein, owned by the said John Crowe

with intent to deprive and defraud the said owner of said property, and of the use and benefit thereof, and

to appropriate the same to their own use, did steal said property

from the person

of the said John Crowe

the true owner thereof.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant s of the crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

The said defendant s , acting in concert with e ach other,

in the County of Bronx aforesaid, on the day and in the year aforesaid, with intent to commit the crime of robbery, feloniously did assault the said John Crowe.

FOURTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant s of the crime of CRIMINALLY BUYING AND RECEIVING STOLEN PROPERTY, as a misdemeanor , committed as follows:

The said defendant s, acting in concert with e ach other,

in the County of Bronx aforesaid, on the day and in the year aforesaid, unlawfully did buy and receive certain property, to wit, the same property mentioned, described in and set forth in the first count of this indictment, to which reference is hereby made, of the value mentioned and set forth therein, the property of the said John Crowe

which had been stolen and wrongfully appropriated, said defendants then knowing the same to have been stolen and wrongfully appropriated and intending to deprive said owner thereof.

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of CRIMINALLY CONCEALING AND WITHHOLDING STOLEN AND WRONGFULLY APPROPRIATED PROPERTY, as a misdemeanor, committed as follows:

The said defendants, acting in concert with each other,

in the County of Bronx aforesaid, on the day and in the year aforesaid, unlawfully did conceal and withhold, and aid in concealing and withholding certain property, to wit, the same property mentioned, described and set forth in the first count of this indictment, to which reference is hereby made, of the value mentioned and set forth therein, the property of the said John Crowe

which had been stolen and wrongfully appropriated, said defendants then knowing the same to have been stolen and wrongfully appropriated and intending to deprive said owner thereof.

ISIDORE DOLLINGER,
District Attorney.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CONSTANCE TREZZA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. On the 24th day of December , 1975 , she served the annexed upon the following named person :

RICHARD G. ASHWORTH
Attorney for Appellant,
Mark Frasier
One State Street Plaza
New York, New York 10004

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Constance Trezza

Sworn to before me this
24th day of December , 1975

Ellen Z. Cohen

Assistant Attorney General
of the State of New York